

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z 515 14 9333-D4
Issued to: Robert B. Arnold

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2280

Robert B. Arnold

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 18 September 1981, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct and physical incompetence. The specifications found proved alleged that Appellant while serving as crew messman aboard the SS AUSTRAL LIGHTING, under authority of the captioned document, (1) did on or about 6 June 1981 fail to perform his assigned duties, by not serving breakfast; (2) did on or about 10 June 1981 while the vessel was in Sydney, Australia, fail to perform his duties, by not serving supper; (3) did on or about 10 June 1981 while the vessel was in Sydney, Australia fail to join for the continued voyage to Melbourne, Australia; (4) did on or about 20 June 1981, fail to perform his duties for reasons of intoxication; (5) did on or about 21 June 1981, fail to perform his duties for reasons of intoxication; (6) did on or about 22 June 1981 while vessel was in Brisbane, Australia, fail to join for the continued voyage to San Francisco, California; (7) was on or about 21 June 1981 while the vessel was in port at Brisbane, Australia, and at the time of the hearing was, physically incompetent to perform the duties of an American merchant seaman due to diabetes mellitus, pancreatitis, and alcohol abuse.

The hearing commenced on 13 July 1981 at San Francisco, California. At that hearing, on motion of the Investigating Officer, the charge of incompetence was dismissed and Appellant was granted a change of venue to Long Beach, California. At Long Beach the Appellant was again charged with physical incompetence.

The hearing was held at Long Beach, California on 3 September 1981 and continued on 9 September 1981.

At the hearing, Appellant elected to act as his own counsel and entered a plea of guilty to the misconduct charge and specifications 1 and 2. Appellant entered a plea of not guilty to the remaining specifications of the misconduct charge and not

guilty to the incompetence charge and all specifications.

The Investigating Officer introduced in evidence the testimony of one witness and nine exhibits.

In defense on the merits, Appellant offered three documents, two of which were admitted, and testified in his own behalf.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charges and all specifications had been proved. He then served a written order on Appellant revoking all documents issued to Appellant.

The order was served on 9 September 1981 and the entire decision was served on 9 October 1981. Appeal was timely filed on 2 October 1981 and perfected on 1 March 1982.

FINDINGS OF FACT

From 17 May 1981 to 22 June 1981 Appellant was serving under the authority of his Coast Guard issued document No. 515-14-9333-D4 as crew messman aboard the United States SS AUSTRAL LIGHTNING. On 6 June 1981 while serving in the above mentioned capacity, Appellant failed to serve breakfast for the crew as was his duty. On 10 June 1981, while the SS AUSTRAL LIGHTNING was in the port of Sydney, Australia, Appellant failed to serve supper. The same day the vessel departed Sydney, Australia enroute to Melbourne, Australia. Appellant was ashore without proper authority at the time of departure, thereby failing to join the vessel for the continued voyage. On 13 June 1981, Appellant rejoined the vessel in Melbourne and made the voyage to Brisbane. Appellant was unable to perform his routine duties on 20 and 21 June due to intoxication. At 0030 on 22 June 1981 Appellant departed the vessel without proper authority and was not available for the scheduled departure at 0200 for San Francisco, California. After departing the vessel, Appellant was admitted to Princess Alexandra Hospital where he was diagnosed as suffering from pancreatitis and diabetes mellitus with both conditions exacerbated by alcohol use. Appellant was discharged on 23 June 1981 at 1700, not fit for duty.

Appellant was diagnosed as being insulin dependent as early as 2 January 1979. Upon returning to the United States, Appellant's diagnosis of diabetes mellitus and pancreatitis was reaffirmed. However, the United States Public Health Service (USPHS) indicated that Appellant was fit for duty on 7 July 1981.

BASES OF APPEAL

This appeal has been taken from the Decision and Order of the

Administrative Law Judge. Appellant's appeal is based on the following contentions:

(1) The charge of physical incompetence had been dismissed at San Francisco, California prior to the hearing at Long Beach, California which led to the Order now on appeal, and any such charge of physical incompetence was not properly before the Administrative Law Judge at the time of the Long Beach hearing by reason of said prior dismissal.

(2) Prior dismissal of the charge of physical incompetence, rather than a withdrawal pursuant to 46 CFR §5.20-65 of said charge, was a judicial bar to any charge of physical incompetence raised at the hearing in Long Beach, California.

(3) Any attempt by the Coast Guard Investigating Officer to add a charge of physical incompetence less than seven days before the date of the Long Beach Hearing was prejudicial to Appellant.

(4) There is no evidence in the record that Appellant was ever served with any valid charge of physical incompetence prior to the Long Beach hearing.

(5) Failure of the Administrative Law Judge to elicit any explanation of the minor charges of misconduct to which Appellant was willing to offer a guilty plea made it impossible for the Administrative Law Judge to properly render a remedial order thereon or to weight any evidence inconsistent with said pleas of guilty.

(6) The expert medical testimony offered at the hearing lacked any foundation namely, there was no evidence in the way of medical records, or otherwise, provided to the medical witness which indicated that Appellant, at the time of the hearing, was physically incompetent or that said witness had examined the Appellant, or had reviewed any of Appellant's recent medical records.

(7) Appellant was not told that any expert medical witness would testify in support of the Government's charges of physical incompetence at the Hearing.

(8) At all relevant times, Appellant was fit for duty according to the USPHS which was charged by law with the sole and final decision on the issue of Appellant's duty status.

(9) The Administrative Law Judge's rejection of Appellant's offer of proof that he was fit for duty was clearly erroneous and prejudicial namely, the Judge's refusal to accept into evidence

records from USPHS which showed that, at the time of the Hearing, Appellant was fit for sea duty.

(10) The Administrative Law Judge erred in his assumption that Appellant had not worked as a merchant seaman for long periods of time during which Appellant had no prior disciplinary record. This was clearly prejudicial and resulted in the Judge's decision to revoke Appellant's document and is clearly contrary to the evidence in the record.

(11) The Administrative Law Judge failed to properly notice and employ the Scale of Average Orders, 46 CFR, Table 5.20-165.

12. The Decision and Order of the Administrative Law Judge is erroneous on its face in that it sets forth both a finding of incompetence, based in part on hospitalization records while, at the same time, the decision contains a finding of failure to join the vessel when he was so hospitalized.

APPEARANCE: Appearance was first made on appeal by Jon P. Camp, attorney of Sullivan, Grehan & Camp of San Francisco, CA.

OPINION

I

Appellant presents several arguments concerning the inappropriateness of the Administrative Law Judge finding proved the charge of incompetence and its three specifications including lack of jurisdiction to make the determination as to whether Appellant was physically incompetent at the time of the hearing.

Considering my resolution of this case, only the question of jurisdiction warrants discussion.

Appellant urges that the USPHS was the primary agency responsible for examining and determining the duty status of this seaman. However, the duty status of a seaman based on a physical examination is not synonymous with a determination of physical competence. The Administrative Law Judge, pursuant to R.S. 4450, has the authority to determine whether Appellant committed an act of incompetency based on the evidence available.

Appellant's diagnoses of diabetes mellitus and chronic pancreatitis are well documents in his medical records. Appellant has been found "fit for duty" and "not fit for duty" with the above mentioned diagnoses dependent upon the stability of the conditions at the time of examination. It was alleged that Appellant was incompetent to perform his duties on 21 June and was incompetent on

the day of the hearing. The charge of incompetence relating to the events of 21 June 1981 was dismissed. The record is insufficient to show that Appellant was incompetent at the time of the hearing. The only evidence supporting incompetence at the time of the hearing was the testimony of the medical witness based on the case history of the Appellant. The record is void of any indication that the testimony was based on a recent examination of Appellant. There was no evidence admitted that tended to prove that Appellant was unable to perform his required duties due to a physical disability after 7 July 1981. Ordinarily any allegation of incompetence must be based on sufficient evidence subsequent to any "fit for duty" declaration by the USPHS or it should be found not proved. See Decisions on Appeal Nos. 1169, 1160.

In this case the evidence of record is insufficient to support a finding of physical incompetence.

II

The contention that the Administrative Law Judge failed to provide Appellant an opportunity to give an explanation related to the specifications of the charge of misconduct is without merit. The record is clear that Appellant was afforded adequate opportunity to present matters in defense on the merits and in mitigation.

III

The Table of Average Orders is for the information and guidance of the Administrative Law Judge. The orders listed for the various offenses are average only and should not in any manner affect the fair and impartial adjudication of each case on its individual facts and merits. See 46 CFR 5.20-165(a). Simply stated, the Administrative Law Judge is not bound by the table so long as his decision is supported by the record. Decisions on Appeal Nos. 2240, 2138, and 2068.

IV

Appellant argues that the finding of physical incompetence and failure to join are inconsistent. In support of that contention Appellant presents his hospitalization as a defense. The record supports the conclusion that Appellant's use of alcohol aggravated his existing conditions which necessitated his hospitalization. A defense built of improper activity of Appellant is faulty.

CONCLUSION

The charge of Misconduct and its six specifications were

proved by reliable, probative and substantial evidence. The charge of physical incompetence was not proved.

ORDER

The findings and order of the Administrative Law Judge dated at Long Beach, California on 9 September 1981, are modified as follows: The findings of the Administrative Law Judge as to the charge of INCOMPETENCE are set aside and the charge DISMISSED; and the order of the Administrative Law Judge as to the revocation of Appellant's documents if MITIGATED to ten months suspension. The order of the Administrative Law Judge, as modified, is AFFIRMED.

J. S. GRACEY
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 22d day of July 1982.